COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

15-P-283

RICHARD HULLY & another[1]

vs.

DEUTSCHE BANK NATIONAL TRUST COMPANY, trustee.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Plaintiffs Richard Hully and Judie K. Kaiser appeal from the dismissal of their complaint for declaratory and injunctive relief with respect to the defendant, Deutsche Bank National Trust Company's (Deutsche Bank's), attempt to foreclose upon their home. The plaintiffs contend that the motion judge erred in his determination that they lacked standing to pursue any of the claims set forth in their complaint. Largely for the reasons set forth by the motion judge in his well-reasoned memorandum of decision and order, we affirm.

A motion for judgment on the pleadings under Mass.R.Civ.P. 12(c), 365 Mass. 754 (1974), effectively functions as a "motion to dismiss . . . [that] argues that the complaint fails to state

[1] Judie K. Kaiser.

[2] Of the Residential Asset Securitization Trust 2006 A16, Mortgage Pass-Through Certificates, Series 2006-P under the pooling and servicing agreement dated December 1, 2006.

a claim upon which relief can be granted." Jarosz v. Palmer, 436 Mass. 526, 529 (2002), quoting from Smith & Zobel, Rules Practice § 12.16 (1974). Our review of the allowance of a rule 12(c) motion is de novo. See Okerman v. VA Software Corp., 69 Mass. App. Ct. 771, 775 (2007).

We accept as true the following factual assertions in the plaintiffs' complaint, supplemented by the documents attached to the complaint. See Minaya v. Massachusetts Credit Union Share Ins. Corp., 392 Mass. 904, 905 (1984). See also Mass.R.Civ.P. 10(c), as amended, 456 Mass. 1401 (2010) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes"). In October, 2006, the plaintiffs refinanced their residence located on Green Lane in Sherborn. They executed a promissory note in the amount of $756,800 to American Mortgage Network, Inc., doing business as American Mortgage Network of Massachusetts (AMN), and a mortgage naming AMN as the lender and Mortgage Electronic Registration Systems, Inc. (MERS) as the mortgagee, and identifying MERS as the nominee for AMN and its successors and assigns. According to the affidavit of Jon Dickerson, vice-president of OneWest Bank, FSB, Deutsche Bank's duly authorized agent, Deutsche Bank became holder of the note on December 13, 2006. On June 15, 2011, MERS assigned the mortgage to Deutsche Bank. The assignment was recorded at the Middlesex County (South) Registry of Deeds on August 24, 2011.

At the time it attempted to initiate the foreclosure sale, Deutsche Bank held both the note and the mortgage.

The plaintiffs, as mortgagors, may challenge the foreclosure as "void by reason of [the mortgagee's] lack of legal authority to conduct it." Bank of N.Y. Mellon Corp. v. Wain, 85 Mass. App. Ct. 498, 502 (2014) (Wain), quoting from Sullivan v. Kondaur Capital Corp., 85 Mass. App. Ct. 202, 206 (2014). "Any effort to foreclose by a party lacking 'jurisdiction and authority' to carry out a foreclosure . . . is void." U.S. Bank Natl. Assn. v. Ibanez, 458 Mass. 637, 647 (2011) (citation omitted). However, "where the foreclosing entity has established that it validly holds the mortgage, a mortgagor in default has no legally cognizable stake in whether there otherwise might be latent defects in the assignment process." Wain, supra.

In claiming that the mortgage is void, and that they therefore have standing to challenge the foreclosure, the plaintiffs make three primary arguments.[3] First, they claim that the assignment was deficient on its face for failing to comply with G. L. c. 183, § 54B. We disagree. Because Deutsche Bank established that the assignment complied "with the requirements

[3] To the extent that we do not address the plaintiffs' other claims of error, they "have not been overlooked. We find nothing in them that requires discussion." Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

of the governing statute, it was 'otherwise effective to pass legal title' and cannot be shown to be void." Wain, supra at 503 (citation omitted). The plaintiffs have no standing to challenge the assignment where, as here, "the assignment on its face satisfies the applicable statutory requirements," even if the properly-identified signatory "may not in fact have had the authority to do so." Ibid.

Second, the plaintiffs claim that MERS lacked the authority to assign the mortgage containing the statutory power to foreclose under G. L. c. 244, § 14. This argument is unavailing. The plaintiffs do not have standing to challenge "latent defects in the assignment process." Wain, supra at 502. Moreover, even if the plaintiffs had standing to challenge MERS's assignment under G. L. c. 244, § 14, their principal contention that the note and the mortgage were split in the course of the transactional history holds no weight because "in Massachusetts, a mortgage and the underlying note can be split." Eaton v. Federal Natl. Mort. Assn., 462 Mass. 569, 576 (2012).

> "[A]lthough a foreclosing mortgagee must demonstrate an unbroken chain of assignments in order to foreclose a mortgage, and now must also demonstrate that it holds the note (or acts as authorized agent for the note holder) at the time it commences foreclosure, nothing in Massachusetts law requires a foreclosing mortgagee to demonstrate that prior holders of the record legal interest in the mortgage also held the note at the time each assigned its interest in the mortgage to the next holder in the chain."

Sullivan, 85 Mass. App. Ct. at 210 (citations omitted). As MERS was the mortgagee when it assigned the mortgage to Deutsche Bank, and as Deutsche Bank held both the note and the mortgage at the time of foreclosure, it had the necessary authority to execute a valid foreclosure.

Finally, the plaintiffs allege that the assignment violated the terms of the trust involved in Deutsche Bank's pooling and servicing agreement (PSA), and that the assignment does not comply with New York law. Again, they lack standing to assert this claim. The plaintiffs were not party to the trust nor the PSA, nor were they the intended beneficiaries of the trust. They may not maintain a suit to enforce its terms. See Rajamin v. Deutsche Bank Natl. Trust Co., 757 F.3d 79, 87 (2d Cir. 2014) (under New York law, only intended beneficiary of private trust may enforce trust terms).

Judgment affirmed.

By the Court (Vuono, Grainger & Massing, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: March 15, 2016.

[4] The panelists are listed in order of seniority.